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Reviewing the Reviewability of the Attorney General for Northern Ireland

Introduction

Some interesting cases have been heard recently in the High Court of Northern Ireland regarding the Attorney General's amenability to judicial review. This analysis begins by outlining why the UK's senior judiciary have historically viewed the Attorney's functions as largely non-reviewable pockets of public power. This historical view is then contrasted with an apparently emerging view of the courts; one which suggests the reviewability of the Attorney's varied functions might henceforth be decided on a case-by-case basis and with varying degrees of intensity. It seems that both the question of reviewability and that of the appropriate level of intensity stand to be determined with reference to the grounds on which an application for review has been based as well as the character of the function under challenge. I offer my thoughts on why the emerging view embodies a preferable approach by way of conclusion.

I must preface my analysis by acknowledging the different constitutional models in place for the law officers of the UK. The Attorney General for Northern Ireland ('AGNI') and the Attorney General for England and Wales ('AGEW'), for example, are very different creatures indeed. In the present context it should be noted, for reasons which will soon be apparent, that the office of AGNI was first established in 1921. Between 1972 and 2010, however, it was held conterminously with the office of AGEW; that is, the AGEW was, by virtue of that office, also the AGNI.¹ This arrangement ceased when policing and justice functions were devolved to Northern Ireland in 2010. The office of the AGNI is now standalone and held by John Larkin QC, while the office of the AGEW is held separately by Jeremy Wright QC MP. In addition, the latter office-holder now automatically occupies the office of Advocate General for Northern Ireland. I highlight the historical relationship between these offices in order to explain why landmark court decisions relating to the reviewability of the AGEW inexorably applied to the AGNI of the time too. This, together with an awareness of the considerable differences between these offices in the present day, may go some way towards justifying the apparent shift in judicial approach to the reviewability of the currently constituted office of the AGNI.

The Position Prior to 2010

Judicial engagement with the question whether courts have jurisdiction to review an Attorney's exercise of discretionary power has arisen entirely in relation to so-called 'public interest' functions. These were historically distinguishable from so-called 'ministerial' functions in so far as the former had to be exercised independently, while the latter could be exercised in accordance with the demands of collective ministerial responsibility (the AGNI is today an unelected political appointee who is required by s 22(5) of the Justice (Northern Ireland) Act 2002 ('the 2002 Act') to exercise *all* his functions independently, which obviously complicates the modern applicability of this distinction). The discretion to grant or refuse their fiat to relator actions, that is: proceedings taken in the name of the Attorney General to enforce rights of a public nature at the request of a private individual, has long been considered a public interest

¹ A dated but useful account of the office during some of this period is included in the following classic text: John Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) 236–268. The older companion to this volume is also recommended reading for analogous points of interest: John Ll. J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964).

function of Attorneys General in the UK. Indeed, it was a challenge to this power which gave rise to the seminal judicial dispute in *Gouriet* concerning the Attorney's amenability to judicial review.

The dispute to which I refer is, of course, that between the opinion of Lord Denning and the opinions of his fellow Lords Justices of Appeal and a unanimous bench of Law Lords.² Lord Denning's view, with which Lawton LJ and Ormrod LJ were unable to agree, was that it would be 'a direct challenge to the rule of law' for an Attorney to prevent a citizen from enforcing rights of a public nature by refusing his consent to a relator action. Circumstances such as these would, Lord Denning suggested, render it permissible for courts to indirectly override an Attorney's exercise of discretion.

Lord Denning's position on the reviewability of the Attorney General was specifically and unequivocally rejected by the House of Lords. Lord Wilberforce emphasised that the courts were not 'fitted or equipped' to review the powers of Attorneys General when they involve assessments of what is in the public interest. Moreover, Viscount Dilhorne (a former Attorney General) felt compelled to address Lord Denning's remarks at some length because he considered it 'undesirable that any judicial observations suggesting that the exercise by the Attorney-General of [his or her] functions and duties is subject to control, supervision and review by the courts should be left unanswered'. The suggestion that an Attorney's refusal to consent to a relator action might constitute a challenge to the rule of law was 'entirely misconceived' in his judgment. Lord Edmund-Davies agreed, describing the Attorney General's discretion as 'absolute and non-reviewable'. Lord Fraser, too, expressed his particular preference for political accountability of the Attorney General in the following terms:

If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest.

There was some cause to doubt the continuing commitment of the House of Lords to this absolutist position in respect of the Attorney's immunity from review in light of its subsequent judgment in the GCHQ case, which of course expanded the reach of judicial review to include, in particular, prerogative decisions made by members of the executive.³

The consequences of the GCHQ case and others following *Gouriet* were subsequently considered in an exhaustive judgment by Popplewell J in *R v Attorney General, ex p Ferrante*.⁴ The learned judge derived the following significant propositions from his examination of the authorities: that *Gouriet* is 'of general application and is not limited to relator actions'; that 'the

² *Gouriet v Union of Post Office Workers* [1977] QB 729 (CA); *Gouriet v Union of Post Office Workers* [1977] UKHL 5, [1978] AC 435.

³ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1985] AC 374. See also: John L. J. Edwards, 'The Office of Attorney General – New Levels of Public Expectations and Accountability' in Philip C. Stenning (ed), *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) 312-323; Barry Hough, 'Judicial Review Where the Attorney General Refuses to Act: Time for a Change' (1988) 8 Legal Studies 189, 193-200.

⁴ [1994] Lexis Citation 4482.

decision whether the power of the Attorney is immune from review does not depend upon the source of those powers but on their character'; that the question whether the Attorney's functions are amenable to review is not influenced by the fact 'he is no longer the exclusive guardian of the public interest'; that the fact 'a local authority exercising similar powers is subject to judicial review though logically compelling is not a reason for making the Attorney General so subject'; that 'the question of whether the decision is amenable to judicial process depends on the nature and subject matter'; that courts will consider decisions 'on a case by case basis'; and that while Parliament has entrusted Attorneys with the power to grant or refuse their consent to a wide variety of litigation, it is unclear whether in every case that power will involve 'questions of policy which it is for Parliament and not for the Courts to assess'. The judge felt unable to make any rulings flowing from this analysis, however, after concluding that if the principle in *Gouriet* was 'no longer good law in relation to the Attorney Generals' powers' it was for a higher court to so decide. When this judgment was in due course considered by the Court of Appeal,⁵ it was only willing to assume that the Attorney was subject to judicial review for the purposes of giving judgment on other issues; stressing that the court had decided not to make a ruling on the matter, 'very important' and 'extremely complex' though it was, having determined it was unnecessary to do so in order to resolve the appeal.

Similar deference to the precedent set by *Gouriet* was subsequently shown by Stuart-Smith LJ, with whom Butterfield J agreed, in the case of *R v Solicitor-General, ex p Taylor*.⁶ Having surveyed the 'formidable authorities' for itself, the *Taylor* court found in favour of the 'clearly established position' of non-reviewability; adding that, notwithstanding the fact that the reason the decision under challenge was considered non-reviewable related to the policy considerations underpinning it, that did not mean that in a case devoid of such considerations the decision would be 'exceptionally reviewable'. The court held that to accept that submission would defy logic and prove impossible to apply in practice.

The first case decided before the 2010 re-establishment of a standalone law officer for Northern Ireland which suggests a subtle change in approach to the question of amenability is perhaps *R v Attorney General, ex p Rockall*,⁷ wherein permission for judicial review of the Attorney General's decision to grant his consent to several alleged offences of corruption was refused without recourse to any of the above jurisprudence. Instead, the court refused permission simply because the applicant had failed to establish an arguable case for review. It is curious, to say the least, that counsel for the Attorney appears to have argued that permission should be refused on this basis without first inviting the judge to strike out the application on account of the more fundamental constitutional grounds advanced in previous cases.

A more dramatic change of approach is discernible from *Re Shuker's Application*,⁸ where the court held that only certain exceptional categories of case would fall outside of its purview. The case concerned a decision by the Attorney not to certify particular offences and thereby prevent them from being treated as 'scheduled offences' under the Terrorism Act 2000. The court decided that that species of decision was justiciable, but held that there were 'significant constraints on the extent of review that may be undertaken'. In other words, the intensity of review applied to decisions of the Attorney depended on the character of the decision under review. *Shuker* failed to convince the court that the Attorney's refusal to certify should be subjected to review on grounds of procedural unfairness but the court emphasised, nonetheless,

⁵ [1995] Lexis Citation 3540.

⁶ [1995] Lexis Citation 1516.

⁷ [2000] 1 WLR 882.

⁸ [2004] NIQB 20, [2004] NI 367.

that the Attorney's decisions might be 'deemed appropriate' for judicial review in different circumstances. This was a remarkable departure from the constitutional absolutism expounded by the House of Lords in *Gouriet* as well as the deference to that judicial precedent exhibited by judges of the High Court hitherto.

Different circumstances did in due course give rise to another application for judicial review. The discretion of the AGNI to decide whether to order a fresh inquest under s 14 of the Coroners Act (Northern Ireland) 1959 ('the 1959 Act') was raised in a set of proceedings wherein that discretion was delimited by a fairly traditional exercise of statutory interpretation. In *Re Forde's Application*,⁹ the Court of Appeal confirmed the decision of Gillen J at first instance¹⁰ by holding that s 14 could not be interpreted 'as investing the Attorney General with a power to effectively confer a jurisdiction on the coroner which he does not have'. To do so would, *per* Gillen J, simply 'be so incongruous with the remaining sections of the Act that it would be contrary to any notion of precision drafting'. Appearing to take any questions of justiciability or reviewability for granted, the courts involved in *Forde* proceeded to impose limitations upon a broad discretion of the Attorney through the application of well-established public law principles of illegality. Perhaps the fact that the Attorney's power derived from statute influenced the court's assumption of amenability; all statutory powers being generally amenable to judicial review.¹¹ It is arguably problematic, however, that the tension between this rule and the Attorney General's 'unique constitutional position'¹² was not addressed.

These decisions might be feasibly rationalised by some remarks made by Lord Bingham in *Mohit v Director of Public Prosecutions of Mauritius*.¹³ His Lordship held that a statement by Viscount Dilhorne in *Gouriet* as regards the non-reviewability of the Attorney's prerogative power to enter a *nolle prosequi* 'remains a binding statement of English law on cases covered by it', but implied that *Gouriet* may need to be 'reviewed or modified in light of the House in the GCHQ case'. This is presumably an implicit reference to the propositions made by Popplewell J in *Ferrante*. Similar sentiments have since been expressed by Nicol J in the inquest case of *R (Halpin) v Attorney General*,¹⁴ wherein the judge stated 'it would be an unattractive position, to put it neutrally, if [substantial grounds for considering that the Attorney had acted unlawfully were] beyond the power of the courts to judicially review'. Lord Bingham also implicitly accepted there are no 'inherent constitutional objections' to the Attorney's statutory functions being scrutinised by way of judicial review in *Mohit*. While this provides some indirect, retrospective authority for the assumed jurisdiction of the courts involved in *Shuker* and *Forde*, it does seem doctrinally at odds with the more general principle established by Lord Scarman in the GCHQ case: that the 'controlling factor' in determining whether a particular power is subject to judicial review is 'not its source but its subject matter'.

The Position Post-2010

The judicial position on the reviewability of the standalone office of the AGNI since 2010 can now be explored in light of the context outlined above. My reading of the relevant transcripts suggests that the Northern Ireland judiciary is open to hearing arguments for a changed

⁹ [2009] NICA 66.

¹⁰ [2008] NIQB 40, [2009] NI 29.

¹¹ *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, 847 (Lloyd LJ).

¹² [1995] Lexis Citation 1516.

¹³ [2006] UKPC 20, [2006] 1 WLR 3343.

¹⁴ [2011] EWHC 3759 (Admin).

approach to reviewability which bear in mind the changed constitution of the devolved Attorney. There are three notable judicial opinions to examine.

First, there is the unreported judgment of Maguire J in *Re Johnstone's (Dorothy) Application for Leave* (17 June 2016). The decision of the AGNI not to order a fresh inquest under s 14 of the 1959 Act was challenged on a number of common law grounds and on account of the investigative obligations imposed by Article 2 of the ECHR. Counsel for the AGNI cited *Ferrante* in support of his submission 'that the AGNI as a law officer could not be made subject to the court's judicial review jurisdiction, save in the area of the case dealing with misdirection or breach of Convention rights'. The absence of any claim to absolute immunity from review is perhaps of note, but unsurprising in light of the jurisprudential developments traversed above. That counsel for the Attorney accepted he was bound to observe the requirements of Human Rights Act 1998 is also uncontentious. Counsel for the applicant, however, argued for a more expansive interpretation of the court's jurisdiction by submitting that

the law has moved on since *Ferrante* and that the trend today is very much in favour of judicial review being available in principle to the widest degree possible. As the AGNI was exercising a statutory function ... there ought to be no significant difficulty in ensuring by judicial review that he has acted consonantly with the limits of his authority.

In support of these submissions, a range of the authorities explored above were cited to the court (*Shuker*; *Forde*; *Halpin*; *Mohit*) which convinced Maguire J to accept the applicant's argument with 'little hesitation'. The learned judge went so far as to reveal the following inclinations in his judgment:

Whatever the merits of the *Ferrante* case, it seems clear to the court that this is an area where the law is not static. In this jurisdiction in *Shuker* the court did not hold that the AG could not ever be judicially reviewed and leave had been granted in that case. Likewise in *Forde* neither at first instance nor on appeal was any point taken by counsel or the court that the latter lacked jurisdiction. In these circumstances, the court considers the point arguable which is sufficient for the purpose of this leave judgment.

The court went on to decide that the applicant's common law grounds for review were unarguable and therefore refused leave for review of those matters. The discretion of the AGNI under s 14 was read as laying 'not inconsiderable emphasis on ... the judgment and assessment of the AGNI personally' which the court considered sufficient to warrant 'a light touch form of review'. Applying this light touch, Maguire J ruled that the decision of the AGNI was 'within the latitude he has had conferred on him by the statute'. The court did, however, grant leave for review of the Attorney's decision on the ground that a fresh inquest was necessary for the purpose of discharging the investigative obligation imposed by Article 2 of the ECHR.

This takes us to the second interesting judicial opinion on this topic since 2010. The substantive application in *Johnstone* was heard by Deeny J.¹⁵ Counsel for the AGNI 'submitted that it was still the Attorney's position that "in this category of case, where the grounds of challenge are based on common law principles, his decision is immune from review"'. For the purposes of the case before the court, however, counsel 'opted to defend the decision of the Attorney

¹⁵ [2017] NIQB 33.

without relying on that argument'. Counsel instead urged the court to show 'a high degree of deference to the decision of the Attorney'; a request met with some opprobrium by the court. Deeny J emphasised his preference for the notion of 'mutual respect' between different arms of the State in lieu of the 'misplaced' term 'deference'. In the end, the court chose not to make any definitive ruling on arguments in relation to the Attorney's reviewability. The question was moot, in the court's view, because even if it had applied 'heightened scrutiny' to the Attorney's decision it would have 'nevertheless come to the conclusion that he was justified in his decision'.

In the course of argument before Deeny J, counsel for the AGNI cited the judgment of Maguire J in *Re Mulhern's (Francis) Application for Leave*¹⁶ to support his claim that the requirements of Article 2 of the ECHR can be met in several ways. *Mulhern* is the third and final judicial opinion I wish to highlight in this segment. A decision of the AGNI not to order a fresh inquest under s 14 was again the subject of the challenge. Maguire J referred to his consideration of the authorities in *Johnstone* and maintained his view that the AGNI is 'at least arguably' subject to judicial review. In light of Deeny J's decision not to rule on the question whether the AGNI is even in principle amenable to review on common law grounds, it is of particular note that Maguire J made the following remarks in the course of his judgment against *Mulhern*:

the court is ... unpersuaded that the AGNI cannot be made subject to a rationality challenge ... In the court's view, the AGNI is exercising a statutory discretion which may rightly be viewed as wide but this, in itself, does not mean that it could never be the subject of a *Wednesbury* type challenge. The width of the discretion taken with the language in which the discretion is cast together with the constitutional role of the decision maker, causes the court to approach the issue of review with what might be viewed as a light touch.

Maguire J's analysis of the case advanced for *Mulhern* led him to conclude that leave should be refused on all grounds. While *Mulhern* is now effectively *res judicata*, a notice of appeal has been lodged against the decision of Deeny J in *Johnstone*. The Court of Appeal may therefore address the amenability of the AGNI to judicial review in the near future.

Conclusions

As I noted at the outset, it seems that both the reviewability of the AGNI and the appropriate level of intensity to be applied in respect of his various functions could, in future, be determined with reference to the grounds on which an application for review has been based as well as the character of the function under challenge. However, unless a case reaches the UK Supreme Court and that court decides to review or modify *Gouriet* – as the Privy Council in *Mohit* suggested might be warranted – a lower court must be able to distinguish the case before it from *Gouriet* if it intends to adopt this changed approach to the reviewability of the office. The doctrine of *stare decisis* would be undermined otherwise. As it happens, I think it is plainly possible to distinguish *Gouriet* with reference to the effect of the re-establishment of a devolved law officer in 2010 whose office varies significantly from the office of AGEW. Two fundamental differences should be flagged for judicial consideration in my view.

First, the requirement that the functions of the AGNI should 'be exercised by him independently of any other person' under s 22(5) of the 2002 Act is an important variation in

¹⁶ [2016] NIQB 59.

the constitution of the office compared with that of the AGEW. I do not think it is possible to construe this provision as something akin to an ouster clause. Rather, it is intended to prevent any member of the Northern Ireland Executive or indeed the Assembly from influencing the AGNI in the exercise of *any* of his functions in order to further a particular political cause. *Per contra*, several functions of other law officers in the UK are still subject to the doctrine of collective ministerial responsibility. This is a particularly significant constitutional difference in light of the fact the Attorney is not an elected office-holder drawn from the ranks of the Assembly and is therefore insulated from many modes of political influence/accountability.

This takes me to my second observation. While the AGNI cannot be elected to, or be a member of, a district council; the House of Commons; or the Northern Ireland Assembly (see s 23 of the 2002 Act), he may participate in proceedings of the Assembly to the extent permitted by its standing orders (s 25). The Assembly's Committee of Procedures only reported findings from the first part of its inquiry into the appropriate level of participation to be made permissible by standing orders in early 2015,¹⁷ which was subsequently approved by the Assembly but is as yet unimplemented.¹⁸ In any event, the AGNI may decline to respond to any Assembly requests which could, in his view, prejudice criminal proceedings or which are otherwise against the public interest (s 25(3) of the 2002 Act). Moreover, the Assembly has not been functioning for most of the past year; leaving the AGNI much to his own devices. These operational and statutory caveats to the level of political accountability provided for by the 2002 Act should, in my opinion, be borne in mind by any judge deciding whether to adjust definitively the Attorney's amenability to judicial review. The received wisdom for protecting the Attorney General from review expressed by some of the Law Lords in *Gouriet* could be distinguished on such bases. Lord Fraser's stated preference for political accountability, in particular, must be viewed in light of the changed constitution of the office of the AGNI today.

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¹⁷ Committee on Procedures, *Inquiry into the extent to which Standing Orders should permit the Attorney General for Northern Ireland to participate in proceedings of the Assembly: Part 1 – Impartiality of the Office of AGNI, Registration of Interests and Participation of the AGNI in Assembly Proceedings in respect of areas other than Statutory Rules* (NIA 232/11-16, 24 February 2015).

¹⁸ Official Report (*Hansard*), Vol 103, No 3, 13 (16 March 2015).

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